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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

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In the Matter of:

New Castle County, Delaware

Respondent.

ADMINISTRATIVE ORDER
ON CONSENT

Docket No. CWA-03-2014-0225

I. PRELIMINARY STATEMENT and STATUTORY AUTHORITY

1. EPA has made the following findings of fact and conclusions of law and issues this Administrative Order on Consent (Consent Order) pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under Section 309(a) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(a). This authority has been delegated by the Administrator to the Regional Administrator of EPA Region III, and further delegated to the Director, Water Protection Division, Region III.

2. Section 309 of the Act, 33 U.S.C. § 1319(a), provides, *inter alia*, that whenever on the basis of any information available to him the Administrator finds that any person is in violation of any permit condition or limitation implementing certain CWA sections in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342, he shall issue an Order requiring such person to comply with such section or requirement.

II. EPA FINDINGS of FACT and CONCLUSIONS OF LAW

3. New Castle County, Delaware (the County, or Respondent), is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

4. At all times relevant to this Consent Order, Respondent has owned and/or operated a municipal separate storm sewer system (MS4) as that term is defined in 40 C.F.R. § 122.26(b)(8).

5. Respondent's MS4 is located within the geographic boundaries of New Castle County.

6. New Castle County encompasses a total area of approximately 272,826 acres. According to the County, its population is estimated at 546,076 people.

7. Stormwater from New Castle County drains into the numerous creeks and small tributaries of the Delaware Bay, Chesapeake Bay and Piedmont watersheds, which are considered "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 122.

8. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued pursuant to the National Pollutant Discharge Elimination System ("NPDES") program under Section 402 of the Act, 33 U.S.C. § 1342.

9. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. The discharges are subject to specific terms and conditions as prescribed in the permit.

10. "Discharge of a pollutant" includes "any addition of any pollutant or combination of pollutants to waters of the United States from any point source." 40 C.F.R. § 122.2.

11. "Storm water" is defined as "storm water runoff, snow melt runoff and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

12. The term "municipal separate storm sewer system" ("MS4") includes, "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States designed or used for collecting or conveying stormwater, which is not a combined sewer, and which is not a part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2." 40 C.F.R. § 122.26(b)(8).

13. An NPDES permit is required for discharges from an MS4 if the county had a population of 100,000 or more when MS4s were designated by EPA in 1990, Section 402(p)(2)(C) of the Act, 33 U.S.C. § 1342(p)(2)(C); 40 C.F.R. § 122.26(a).

14. Respondent has a population of at least 100,000 people.
15. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Delaware Department of Natural Resources and Environmental Control (DNREC) to issue NPDES permits on April 1, 1974.
16. DNREC issued to Respondent and to co-permittees (Delaware Department of Transportation, the Village of Arden, Delaware, the Village of Ardentown, Delaware, the Village of Ardencroft, Delaware, the Town of Bellefonte, Delaware, the City of Delaware City, Delaware, the Town of Elsemere, Delaware, the Town of Middletown, Delaware, the Town of Newport, Delaware, the City of New Castle, Delaware, the Town of Odessa, Delaware, the Town of Townsend, Delaware, and the City of Wilmington, Delaware) an NPDES MS4 Discharge Permit No. DE 0051071 which became effective on May 1, 2001 (the 2001 MS4 Permit).
17. The expiration date of the MS4 Permit was May 1, 2006. The County timely applied for a new permit. However, the MS4 Permit was administratively extended until NPDES MS4 Discharge Permit No. DE 0051071 was reissued with an effective date of May 7, 2013 (2013 MS4 Permit).
18. An NPDES permit is also required for discharges of storm water associated with industrial activity, as well as for stormwater discharges which DNREC or EPA determine to be a significant contributor of pollutants or that contributes to a violation of a water quality standard. Section 402(p)(2) of the Act, 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26(a).
19. On April 17 and 18, 2013 representatives of EPA conducted an inspection of New Castle County's MS4 program implementation (the MS4 Inspection).
20. In August 2013, EPA issued the New Castle County Department of Special Services Municipal Separate Storm Sewer System (MS4) Program Inspection Report (Inspection Report), which included, in addition to general information regarding the County's MS4 program and history, seven observations regarding the County's MS4 Program related to the requirements of the 2001 MS4 Permit (DE 0051071, effective May 1, 2001). The Inspection Report also included seven appendices (exhibit log, photo log, document log, etc.).
21. The County received a copy of the Inspection Report which was sent by mail on September 18, 2013. The County prepared and submitted a response to EPA on October 23, 2013.
22. Based upon the MS4 Inspection and New Castle County's response, EPA identified two violations, among the seven observations, which it has concluded were violations of the 2001 MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311. This Consent Order addresses these categories and directs the County to take the corrective action described below to comply with MS4

Permit (DE 005107, effective May 1, 2001).

23. Part II.A.8.of the MS4 Permit requires, as part of the County's SWPP&MP, "The co-permittees shall implement a program to identify, monitor, and control pollutants in storm water discharges to the [MS4] from the following "high risk" industrial or commercial facilities: municipal and hazardous waste landfills; industrial facilities that discharge, with or without pretreatment, to the [County] sanitary sewer system; ... and any other industrial or commercial discharge the co-permittees determine are contributing a substantial pollutant load to the [MS4]."

24. Part II.A.8.e of the MS4 Permit requires, as part of this industrial and high risk program, "procedures for maintaining a list of all industrial storm water sources discharging to the [MS4] and updating such a list as necessary to keep it current." According to the County's "Industrial and High Risk Facilities Inspection & Monitoring Program" updated in 2003, the County was responsible for inspecting 27 high risk facilities, including 15 pretreatment facilities, four landfills, and eight Toxics Release Inventory facilities, as part of its 2001 Memorandum of Agreement with DNREC.

25. The County reports on its activities related to the industrial and high risk program, including providing an inventory of facilities inspected, to DNREC. The County began reporting activities, including providing an inventory of facilities inspected, and coordinating responsibilities with DNREC beginning with the 2001 Annual Report. The County believed itself to be in compliance with the terms of the 2001 MS4 Permit.

26. During the MS4 Inspection, no formal documentation was provided to show that the County is developing an up to date inventory of potential facilities on an annual basis. Subsequent to the MS4 Inspection, the County provided additional information primarily in the form of correspondence with DNREC regarding the sharing of responsibilities for the industrial program.

27. Part II.A.9.c of the MS4 Permit requires the co-permittees to perform "enforcement of control measures" for construction site runoff.

28. During the April 17, 2013 inspection of Claymont Library, a county-owned construction site, the EPA inspection team observed a recently addressed stabilization issue on the site. The EPA inspection team observed straw spread on the morning of April 17, 2013 over two rill erosion scars on the interior slope of sediment basin #4. This stabilization issue was first noted as a maintenance item on a January 31, 2013 inspection report, approximately two and a half months prior to straw spreading.

29. Based upon the MS4 inspection, EPA has concluded that Respondent's failures to: 1) maintain an accurate list of "High Risk" facilities and 2) take appropriate and timely enforcement measures at a County owned construction site violated the 2001 MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. ORDER

AND NOW, this 15th day of August, 2014, pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a), having taken into account the seriousness of the violations and any good faith efforts by Respondent to comply with section 301(a) of the Act, Respondent is hereby ORDERED, pursuant to Section 309(a) to do the following:

30. Respondent shall take the following actions necessary to address the alleged violations included herein:

- a. The County shall maintain a Memorandum of Understanding with DNREC regarding the Industrial High Risk Program for the duration of its current MS4 permit term;
- b. County Land Use Site Inspectors will be required to view the archived 2-hour EPA NPDES webcast titled "Construction SWPPPs from A to Z: Everything You Ever Wanted to Know and More!";
- c. The County shall provide a written statement that as of the effective date of this Consent Order, Land Use Site Inspectors will continue to inspect erosion and sediment control features in a manner that directs compliance with the Delaware E&S Control Handbook.

IV. GENERAL PROVISIONS

31. Issuance of this Consent Order is intended to resolve only the specific violations described herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. Further, EPA reserves any existing rights and remedies available to it under the CWA, 33 U.S.C. §1311, et seq., the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction. Further, EPA reserves any rights and remedies available to it under the CWA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this Consent Order, following its effective date (as defined below).

32. This Consent Order does not constitute a waiver or modification of the terms or conditions of the County's MS4 permit. Compliance with the terms and conditions of this Order does not relieve the Respondent of its obligations to comply with any applicable federal, state, or local law or regulation.

33. For the purposes of this proceeding, the County neither admits nor denies the factual allegations and conclusions of law set forth in this Consent Order.

34. Respondent waives any and all remedies, claims for relief and otherwise available

rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

35. NCC has made significant progress in all aspects of its NPDES program. This settlement is intended to encourage continued improvements commensurate with the goals of a quality assurance audit.

36. By entering into this Consent Order, the County does not admit any liability for the civil claims alleged herein.


37. This AOC does not limit or affect the rights of EPA or New Castle County against any third parties, not party to this Consent Order.

V. EFFECTIVE DATE

This ORDER is effective after receipt by Respondent of a fully executed document.

SO ORDERED:

Date: 8/15/2014


Jon Capacasa
Director, Water Protection Division
U.S. EPA Region III

AGREED TO:

For New Castle County:

Date: 8/4/2014


Thomas P. Gordon

County Executive